

July 2015

# Impact of RICO Upon Labor Unions

Robert M. Twiss

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>



Part of the [Criminal Law Commons](#), and the [Labor and Employment Law Commons](#)

---

## Recommended Citation

Twiss, Robert M. (1981) "Impact of RICO Upon Labor Unions," *Akron Law Review*: Vol. 14 : Iss. 1 , Article 4.  
Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol14/iss1/4>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

## IMPACT OF RICO UPON LABOR UNIONS

ROBERT M. TWISS\*

**T**HIS PAPER will examine Title IX of the Organized Crime Control Act of 1970,<sup>1</sup> relating to Racketeer Influenced and Corrupt Organizations (RICO). It will then discuss how Title IX pertains to labor unions and whether the assets of a labor organization may be forfeited under the civil forfeiture provisions of the Act.<sup>2</sup>

### THE STATUTE

Approximately one decade ago, Congress passed a number of acts designed to strengthen federal efforts in combatting crime. Among these enactments were the Omnibus Crime Control and Safe Streets Act of 1968,<sup>3</sup> the Omnibus Crime Control Act of 1970<sup>4</sup> and the Organized Crime Control Act of 1970.<sup>5</sup>

Following hearings in 1970, Congress found that:

- (1) organized crime in the United States was a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and illegal use of force, fraud and corruption;
- (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs and other forms of social exploitation;
- (3) this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes;
- (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security and undermine the general welfare of the nation and its citizens; and

---

\*Appellate Defense Counsel, United States Army, Washington, D.C.; B.A., University of Massachusetts, 1970; M.A. Wichita State University, 1979; J.D., University of San Francisco, 1975; LL.M. Candidate, Georgetown University. The views and opinions expressed herein are those of the author alone and do not necessarily reflect those of the United States Army, the Department of Defense or any other agency of the United States Government.

<sup>1</sup> Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered sections of 18, 28 U.S.C.).

<sup>2</sup> 18 U.S.C. § 1963(a) (1976).

<sup>3</sup> Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42, 47 U.S.C.).

<sup>4</sup> Pub. L. No. 91-644, 84 Stat. 1880 (codified in scattered sections of 5, 18, 42 U.S.C.).

<sup>5</sup> Pub. L. No. 91-452, 84 Stat. 922.

- (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the government are unnecessarily limited in scope and impact.<sup>6</sup>

The stated purpose of the Organized Crime Control Act of 1970 was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

The Act provides for the empanelling of a special grand jury at the request of the Attorney General,<sup>8</sup> immunity to witnesses who refuse to testify on the basis of the privilege against self-incrimination,<sup>9</sup> summary confinement of witnesses for refusing to testify before a court or grand jury of the United States,<sup>10</sup> additional sanctions for false declarations before a grand jury or court,<sup>11</sup> protected facilities for housing government witnesses,<sup>12</sup> depositions to preserve testimony,<sup>13</sup> limitations on litigation concerning sources of evidence,<sup>14</sup> prohibitions against syndicated gambling,<sup>15</sup> increased sentences for dangerous special offenders,<sup>16</sup> regulation of explosives,<sup>17</sup> and establishment of a commission to review national policy toward gambling.<sup>18</sup>

Title IX of the Organized Crime Control Act, entitled "Racketeer Influenced and Controlled Organizations,"<sup>19</sup> contains a three-fold standard:

- (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of an activity to acquire an interest in or establish an enterprise engaged in interstate commerce;

<sup>6</sup> Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 922-23.

<sup>7</sup> *Id.*

<sup>8</sup> 18 U.S.C. §§ 3331-3334 (1976).

<sup>9</sup> *Id.* §§ 6001-6005.

<sup>10</sup> 28 U.S.C. § 1826 (1976).

<sup>11</sup> 18 U.S.C. § 1623 (1976).

<sup>12</sup> Pub. L. No. 91-452, title V, §§ 501-504, 84 Stat. 933-34 (included in the code as a note preceding 18 U.S.C. § 3481 (1979)).

<sup>13</sup> 18 U.S.C. § 3503 (1976).

<sup>14</sup> *Id.* § 3504.

<sup>15</sup> *Id.* §§ 1511, 1955.

<sup>16</sup> *Id.* §§ 3575-3578.

<sup>17</sup> *Id.* §§ 841-848.

<sup>18</sup> Pub. L. No. 91-452, title VIII, §§ 804-808, 84 Stat. 938-40 (noted after 18 U.S.C. § 1955 (1976)).

<sup>19</sup> Pub. L. No. 91-452, title IX, §§ 901-904, 84 Stat. 1095-1104 (codified in scattered sections of 18 U.S.C.).

- (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity" and
- (3) proscribing the operating of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity."<sup>20</sup>

Under the Act, it is

unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.<sup>21</sup>

It is "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain . . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."<sup>22</sup> It is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."<sup>23</sup> It is also unlawful to conspire to violate any of the above.<sup>24</sup>

A "pattern of racketeering activity" is defined as requiring "at least two acts of racketeering activity, one of which occurred within ten years (excluding any period of confinement) after the commission of a prior act of racketeering activity."<sup>25</sup> A "racketeering activity" is defined as:

- (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year;
- (B) any act indictable under any of the following provisions of Title 19, United States Code: [the list includes code sections relating to bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obstruction of justice, interference with commerce, robbery, extortion, interstate transportation of wagering paraphernalia, un-

<sup>20</sup> H.R. REP. No. 91-1549, 91st Cong., 2nd Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007-10.

<sup>21</sup> 18 U.S.C. § 1962(a) (1976).

<sup>22</sup> *Id.* § 1962(b).

<sup>23</sup> *Id.* § 1962(c).

<sup>24</sup> *Id.* § 1962(d).

<sup>25</sup> *Id.* § 1961(5).

lawful welfare fund payments, interstate transportation of stolen property, contraband cigarettes and white slave traffic];

- (C) any act which is indictable under Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or Section 501 (c) (relating to embezzlement from union funds); or
- (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.<sup>26</sup>

For purposes of RICO, a " 'person' includes any individual or entity capable of holding a legal or beneficial interest in property"<sup>27</sup> and an " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>28</sup>

Whoever violates the Act is subject to a fine of \$25,000 and imprisonment for twenty years.<sup>29</sup> In addition, any person convicted of violating the Act forfeits any interest acquired or maintained in violation of the Act<sup>30</sup> and "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of Section 1962."<sup>31</sup>

Civil remedies to prevent violation of the Act or to recover damages for its violation are available. The United States district courts "have jurisdiction to prevent and restrain violations" of the Act

by issuing appropriate orders, including but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise. . . .<sup>32</sup>

The Attorney General may institute proceedings,<sup>33</sup> and any person who

<sup>26</sup> *Id.* § 1961(1).

<sup>27</sup> *Id.* § 1961(3).

<sup>28</sup> *Id.* § 1961(4).

<sup>29</sup> *Id.* § 1963(a).

<sup>30</sup> *Id.* § 1963(a)(1).

<sup>31</sup> *Id.* § 1963(a)(2).

<sup>32</sup> *Id.* § 1964(a).

<sup>33</sup> *Id.* § 1964(b). <https://ideaexchange.com/literature/Akron-Law-Review/vol14/iss1/4>

suffers injury to his business or property because of a violation of the Act may sue for treble damages plus costs and attorney's fees.<sup>34</sup>

"Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody or control of any documentary materials relevant to a racketeering investigation, he may . . . issue a civil investigative demand for the production of the documents."<sup>35</sup> If the recipient of such a civil demand fails to comply, the Attorney General can seek enforcement in the appropriate federal district court.<sup>36</sup>

It has been noted that the Racketeer Influenced and Corrupt Organizations statute "does not make illegal any specific action which was previously legal, since all acts punishable under RICO are also punishable under either state or federal statutes."<sup>37</sup> RICO does provide, however, that a person who commits two of the listed offenses is guilty of a "pattern of racketeering activity" and therefore subject to penalties beyond those of the individual listed offenses. The RICO statute, by adding the additional concept of "enterprise" to a criminal prosecution, requires proof of a relationship between the acts that constitute the pattern and that enterprise.<sup>38</sup> The statute is designed to "meet the variety of crimes utilized by organized criminals who invest in, acquire, infiltrate and use illegitimate organizations."<sup>39</sup>

Unlike most criminal legislation, RICO was expressly intended to "be liberally construed to effectuate its remedial purpose."<sup>40</sup> Thus judges are instructed not to apply the traditional judicial cannon that penal statutes should be narrowly construed with any ambiguity being resolved in favor of the accused.<sup>41</sup>

#### JUDICIAL CONSTRUCTION OF "ENTERPRISE"

A significant amount of litigation has surrounded RICO since it was passed in 1970. Most of it has revolved around the meaning of "enterprise" as used in the Act. There has been disagreement among the United States courts of appeals on that question. Since the Act was designed to combat crime, it would be logical to assume that the persons intended to be prosecuted thereunder are the types of organized crime figures known at the time the Act was passed. Further, since Congress intended to inhibit the infiltration of legitimate businesses by organized crime figures, it would

<sup>34</sup> *Id.* § 1964(c).

<sup>35</sup> *Id.* § 1968(a).

<sup>36</sup> *Id.* § 1968(g).

<sup>37</sup> Blakely and Goldstock, "On the Waterfront": RICO and Labor Racketeering, 17 AM. CRIM. L. REV. 341, 348 (1980) (hereinafter cited as Blakely).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 349.

<sup>40</sup> Pub. L. No. 91-452, title IX, § 904, 84 Stat. 947 (noted after 18 U.S.C. § 1961 (1976)).

<sup>41</sup> Blakely, *supra* note 37, at 349.

be logical to assume that the "enterprises" involved in the litigation would be legitimate businesses. Neither assumption, however, has proven valid. Instead, a much broader reading has been given to the statute by the courts.

In the *United States v. Aleman*,<sup>42</sup> the Seventh Circuit Court of Appeals rejected the notion that a defendant under RICO must be an organized crime figure:

The prohibitions of 18 U.S.C. § 1962 (c) apply to "any person" or "any enterprise." Although the stated purpose of the Organized Crime Act, of which RICO is a part, is to eradicate organized crime, the statute itself does not require proof that the defendant or the enterprise are connected with organized crime.<sup>43</sup>

No circuit has held that a defendant must be identified with the popular conception of organized crime in order to be subject to prosecution.<sup>44</sup> The statute itself includes within the definition of "person" any entity capable of holding a legal or beneficial interest in property.<sup>45</sup> Accordingly, labor unions, corporations, trusts and pension plans are among the list of potential defendants.

Not so easily resolved, however, is the issue of what is an "enterprise" within the meaning of the statute. Does an enterprise have to be a legitimate business or can it be a criminal organization? There is a split of authority on this matter. At least six circuits have specifically addressed this issue in RICO cases. Five circuits include illegitimate enterprises within the coverage of the statute.<sup>46</sup> Only the Sixth Circuit requires the enterprise to be legitimate.<sup>47</sup>

<sup>42</sup> 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

<sup>43</sup> *Id.* at 303.

<sup>44</sup> Under RICO, an individual acting alone could be convicted if his actions gained an interest in or control of some enterprise. That enterprise may have no role whatsoever in the commission of the underlying crime. Hence, an individual may murder in order to gain control of a business and be prosecuted, in some circumstances, under RICO.

<sup>45</sup> 18 U.S.C. § 1961(3) (1976).

<sup>46</sup> Second Circuit: *United States v. Huber*, 603 F.2d 387 (2nd Cir. 1977), *cert. denied*, 100 S. Ct. 1312 (1980); *United States v. Altese*, 542 F.2d 104 (2nd Cir. 1974) (exempting illegal enterprises would leave a loophole), *cert. denied sub. nom. Napoli v. United States*, 429 U.S. 1039 (1977); *United States v. Parness*, 503 F.2d 430 (2nd Cir. 1974), *cert. denied*, 429 U.S. 820 (1976).

Third Circuit: *Vignola v. United States*, 464 F. Supp. 1091 (E.D. Pa. 1978), *aff'd mem.*, 605 F.2d 1199 (3rd Cir. 1980), *cert. denied*, 100 S. Ct. 1015 (1980); *Manchester v. United States*, No. 79-656 (E.D. Pa. 1979), *aff'd mem.* 605 F.2d 1198 (3rd Cir. 1980), *cert. denied*, 100 S. Ct. 1344 (1980), summarized at 26 CRIM. L. REP. 4241 (1980); *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

Fifth Circuit: *United States v. Elliott*, 571 F.2d 104 (5th Cir. 1978) (it would deny society the protection Congress intended if court held that the Act does not reach illegal enterprises), *cert. denied*, 439 U.S. 953 (1978); *United States v. McLauren*, 557 F.2d 1064 (5th Cir. 1977) (enterprise includes a prostitution ring), *cert. denied*, 434 U.S. 1020 (1978); *United States v. Brown*, 595 F.2d 407 (5th Cir. 1977) (enterprise includes police taking

The Second Circuit in *United States v. Huber*,<sup>48</sup> found that a group of corporations can be an enterprise within the meaning of the Act. The court felt that to exclude groups of corporations would be an overly rigid reading of the definition included in section 1961.<sup>49</sup> It found that the list of examples included in the definitions was not exhaustive, but merely illustrative.<sup>50</sup> Where the enterprise involved is commercial in nature, courts have consistently construed "enterprise" broadly in light of the congressional mandate that Title IX of the Act "shall be liberally construed to effectuate its remedial purpose."<sup>51</sup> The *Huber* court went on to say:

Congress was concerned about the impact on the American economy of the infiltration of organized crime into interstate commerce. There is no reason to believe that Congress cared what form such infiltration took, except to indicate by an abundance of caution in listing the examples in the definition of enterprise that all such harmful infiltration, regardless of form, should be eradicated. To view "enterprise" as excluding groups of corporations would make it too easy to avoid RICO's forfeiture sanction. One could simply transfer assets from the corporation whose affairs had been conducted through a pattern of racketeering activity to another corporation whose affairs had up to that point not been so conducted. We agree with the government that appellant's reading of the statute would perversely insulate the most sophisticated racketeering combinations from RICO's sanctions, the precise opposite of Congress' intentions.<sup>52</sup>

---

bribes), *cert. denied*, 435 U.S. 904 (1978); *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976) (gambling); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) (gambling).

Seventh Circuit: *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Cappelletto*, 502 F.2d 1351 (7th Cir. 1974) (wagering business), *cert. denied*, 420 U.S. 925 (1975).

Ninth Circuit: *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979) (combination to commit murder and extortion), *cert. denied*, 100 S. Ct. 1345 (1980).

<sup>47</sup> *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979).

<sup>48</sup> 603 F.2d 387.

<sup>49</sup> *Id.* at 393.

<sup>50</sup> *Id.* at 394.

<sup>51</sup> *Id.* (citing Pub. L. No. 91-452, title IX, § 904(a), 84 Stat. 947).

<sup>52</sup> *Id.* It is interesting that *Huber* did not involve the infiltration of business enterprises by "organized crime figures." Appellant was a graduate of Princeton University and Harvard Law School and a member of the New Jersey Bar. He went to work with his father in a hospital supply business which had a number of cost-plus contracts with hospitals in New York and New Jersey. Appellant and his father acquired the business and directed employees to inflate the manufacturers' costs quoted to the hospitals. Invoices were falsified where necessary; hospitals were charged for freight costs not incurred. As a result the business received an 18-25% markup rather than the 5-8% specified in the contracts. The racketeering prosecution was under 18 U.S.C. § 1962. The underlying acts were defrauding the United States in violation of 18 U.S.C. § 371, false statements to the Department of Health, Education and Welfare in violation of 18 U.S.C. § 1001, using the mails to defraud in viola-



In *United States v. Parness*,<sup>53</sup> the court found that acquisition of a foreign corporation through a pattern of racketeering was prohibited by 18 U.S.C. § 1962(b). The fact that the acquired business was foreign did not exclude it from the definition of "enterprise":

Section 1962(b) proscribes the acquisition of "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." "Enterprise" is defined in § 1961(4) to include "any . . . corporation." On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed. . . .

We find Parness' claim unpersuasive for yet another reason. It presupposes that in enacting § 1962(b) Congress intended to focus exclusively upon the enterprise acquired and sought to protect only American institutions. There is no indication that the statute was meant to have such a limited remedial scope. On the contrary, its legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.<sup>54</sup>

The Second Circuit found that limiting the Act to the infiltration of legitimate domestic businesses would permit "those who ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise."<sup>55</sup> Parness had tried to do just that. He had gained control of the St. Maarten Isle Hotel Corporation (which owned an insolvent and partially completed hotel-casino complex on the island of St. Maarten in the Netherlands Antilles) by withholding funds due the corporation, loaning the funds due the corporation to a third party and thereafter preventing the third party from repaying the loans by continually concealing gambling "marker" collections and denying him access to funds remitted.<sup>56</sup>

In *United States v. Altese*,<sup>57</sup> the Second Circuit held that Act applies not only to a legitimate business enterprise conducted through a pattern of racketeering activity, but also to an illegal gambling business. Judge

---

tion of 18 U.S.C. § 1341, and making false statements before a grand jury in violation of 18 U.S.C. § 1623. Although the court discussed infiltration of legitimate business as the basis of its holding that this was an enterprise, use of that theory was probably not necessary under these facts.

<sup>53</sup> 503 F.2d 430.

<sup>54</sup> *Id.* at 439.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 433-35.

<sup>57</sup> 542 F.2d 104. <https://akronlawreview.org/akronlawreview/vol14/iss1/4>

Van Graafeiland wrote a lengthy dissent asserting that "enterprise" was intended by Congress to encompass only legitimate businesses or organizations.<sup>58</sup> He was of the opinion that well established doctrine warned against expansively interpreting broad language which immediately follows narrow and specific terms. Combined with the traditional rule resolving ambiguities in penal statutes in favor of lenity,<sup>59</sup> the judge felt that there was significant doubt as to the scope of section 1962. "Notwithstanding the mandate of Congress to liberally construe the provisions of Title IX . . . 'when choice has to be made between two readings of what conduct Congress made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'"<sup>60</sup>

Judge Van Graafeiland felt that a review of the legislative history left "no doubt that Congress never contemplated that 'enterprise' as used in sections 1961 and 1962 would extend beyond legitimate businesses or organizations."<sup>61</sup> The judge felt that there was nothing in the floor debates to indicate that any member of Congress expected or desired the far reaching interpretation postulated by the majority. He cited *United States v. Moeller*,<sup>62</sup> *United States v. Frumento*<sup>63</sup> and *United States v. Mandel*<sup>64</sup> to support his position. *Frumento* and *Mandel* do not seem on point, however, since they deal with the issue of whether a state agency could be an "enterprise." Both courts held in the affirmative. In *Moeller*, however, District Judge Newman specifically rejected the holding of the Seventh Circuit in *United States v. Cappetto*,<sup>65</sup> and found that section 1962(c) did not include unlawful ventures. The district judge felt that whatever ambiguity existed as to whether "enterprise" should be construed to include unlawful organizations had to be resolved against such a broad construction. *Moeller* would have to be considered to have been overruled by *United States v. Altese* regardless of the persuasiveness of its reasoning.

The Third Circuit, in *Vignola v. United States*,<sup>66</sup> found that the Philadelphia traffic court, of which the appellant was the presiding judge, constituted an enterprise within the meaning of RICO, that the activities of the traffic court affected interstate commerce and that it was unnecessary

<sup>58</sup> *Id.* at 107 (Van Graafeiland, dissenting).

<sup>59</sup> *Id.* (citing *United States v. Campas Serrano*, 404 U.S. 293, 297 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Archer*, 486 F.2d 670, 680 (2d Cir. 1973)).

<sup>60</sup> 542 F.2d at 107 n.1.

<sup>61</sup> *Id.* at 108.

<sup>62</sup> 402 F. Supp. 49 (D. Conn. 1975).

<sup>63</sup> 405 F. Supp. 23 (E.D. Pa. 1975).

<sup>64</sup> 415 F. Supp. 997 (D. Md. 1976).

<sup>65</sup> 502 F.2d 1351 (7th Cir. 1974).

<sup>66</sup> 464 F. Supp. 1091 (E.D. Pa. 1978), *aff'd*, 605 F.2d 1199 (3rd Cir. 1979).

to prove that the bribery involved needed to affect interstate commerce. In *Manchester v. United States*,<sup>67</sup> it found that a complex scheme involving knowing and intelligent payment of a bribe to a state agency employee was covered by RICO.

The Fifth Circuit, in *United States v. Elliott*,<sup>68</sup> found that an organization existing for the purposes of arson, stealing automobiles, counterfeiting automobile titles, stealing meat and intimidating witnesses was an enterprise within the meaning of RICO.

The Seventh Circuit, in *United States v. Aleman*,<sup>69</sup> found that the conduct of two defendants who committed three home burglaries fell within the reach of RICO. The defendants' claim that RICO reaches only activities which constitute infiltration by organized crime of legitimate businesses was rejected in view of the facts that RICO applies to "any person" and "any enterprise" and racketeering activity as defined in the Act includes the state crime of robbery. In *United States v. Grzywacz*,<sup>70</sup> the court held that a municipal police department could be an enterprise within the meaning of RICO. The defendants, all former police officers, were convicted of using their positions to solicit and accept bribes and sexual favors from business establishments for acquiescence in and protection of prostitution and after-hours violations.

The Sixth Circuit, however, held that the Act cannot be applied to persons engaged in racketeering activity unrelated to any legitimate activity.<sup>71</sup> According to the Sixth Circuit, the Act's central aim is "to prevent and punish the financial infiltration and corrupt operation, through patterns of activity, of legitimate business operations affecting interstate commerce."<sup>72</sup> Appellants operated a drug dealing "enterprise" through a pattern of racketeering and conspiracy. It was the government's theory that these were not isolated criminal ventures but simply separate departments of a unitary criminal enterprise under the management and control of two of the appellants.

The appellants' main contention was that the Act was intended to prohibit only the infiltration and operation of legitimate enterprises through patterns of racketeering. They argued that the statute did not reach a group who merely committed a series of racketeering activities. The court found that the legislative history conclusively demonstrated that the Act was

---

<sup>67</sup> No. 79-656 (E.D. Pa. 1978), *aff'd*, 605 F.2d 1198, *cert. denied*, 100 S. Ct. 1344. See summary of the case at 26 CRIM. L. REP. 4241 (BNA).

<sup>68</sup> 571 F.2d 104 (5th Cir. 1978).

<sup>69</sup> 609 F.2d 298 (7th Cir. 1979).

<sup>70</sup> 603 F.2d 682 (7th Cir. 1979).

<sup>71</sup> *United States v. Sutton*, 605 F.2d 260.

<sup>72</sup> *Id.* at 263.

passed "in response to the growing subversion of our society's legitimate institutions of business and labor by organized crime, a relatively recent development that Congress deemed a significantly more dangerous threat to the nation's social and economic stability than the age-old problem of crime for crime's sake."<sup>73</sup>

The Act's evident purpose was to single out racketeering activity undertaken in connection with the subversion of legitimate institutions as a special case deserving of even harsher penal sanctions. . . . Under [this view] the appellants [were] not so much attempting to slip through a 'loophole' in the law as they [were] quite properly pointing out that they did not engage in the aggravated form of racketeering for which RICO was exclusively designed.<sup>74</sup>

The Sixth Circuit held that an "'enterprise', within the meaning of the statute, was 'any individual, partnership, corporation, association . . . and any union or group of individuals associated in fact' that is organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."<sup>75</sup> At least one commentator has concluded that the Sixth Circuit's decision was incorrect.<sup>76</sup> Clearly, the prevailing weight of authority indicates that the case was wrongly decided. The Supreme Court has denied petitions for certiorari in cases involving prosecutions under 18 U.S.C. § 1962(c) where the enterprise affecting interstate commerce in which the defendants participated was a wagering business,<sup>77</sup> an automobile theft business,<sup>78</sup> a burglary business,<sup>79</sup> an insurance fraud business<sup>80</sup> and a prostitution business.<sup>81</sup> While a denial of a petition for certiorari has no precedential value,<sup>82</sup> it cannot be ignored that the Supreme Court has been presented with cases wherein the circuit court has declared that unlawful organizations are within the scope of section 1962 and taken no steps to change those circuit court holdings. I would not expect the Supreme Court, as presently constituted, to overrule the Second, Third, Fifth, Seventh and Ninth Circuits on this matter even if it decided to accept a case for decision. At it stands currently, operations organized for illegal purposes only are considered within the coverage of RICO in five circuits and outside the coverage in one circuit. Five circuits have yet to speak.

<sup>73</sup> *Id.* at 268.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 270.

<sup>76</sup> Blakely, *supra* note 38, at 354.

<sup>77</sup> *United States v. Cappetto*, 502 F.2d 1351; *United States v. Morris*, 532 F.2d 436.

<sup>78</sup> *United States v. Elliott*, 571 F.2d 104.

<sup>79</sup> *United States v. Aleman*, 609 F.2d 298.

<sup>80</sup> *United States v. Hansen*, 422 F. Supp. 430 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978), *cert. denied*, 439 U.S. 912 (1978).

<sup>81</sup> *United States v. McLauren*, 557 F.2d 1064.

<sup>82</sup> The denial may rest upon considerations other than the merits of the particular issue.

## ELEMENTS OF THE OFFENSE

It is insufficient simply to show that a defendant committed two or more of the predicate acts outlined as "racketeering activity" in section 1961(1). The defendant must also be involved in some way with an enterprise that is engaged in or affects interstate commerce.<sup>83</sup> In order to successfully prosecute under section 1962(a), the government must show that: (1) the defendant received income from two acts of racketeering activity which occurred within ten years of each other; (2) the defendant participated as a principal in those acts of racketeering<sup>84</sup> in order to use or invest the income or proceeds thereof in either (a) the acquisition of any interest in or (b) the establishment or operation of, any enterprise; and, (3) the enterprise is engaged in, or the activities of the enterprise affect, interstate commerce. Section 1962(a) is designed to prevent the investment of "dirty money" into an enterprise affecting interstate commerce. Since persons usually do not "buy" their way into a criminal enterprise, section 1962(a) is directed at the investment of funds in legitimate enterprises.<sup>85</sup>

In order to successfully prosecute under section 1962(b) the government must show: (1) that the defendant engaged in two or more racketeering activities within ten years of one another or that he collected an unlawful debt; (2) that the defendant acquired or maintained an interest or control in an enterprise by means of those racketeering activities; and, (3) that the enterprise was engaged in or the activities of the enterprise affected interstate commerce. Section 1962(b) is designed to prohibit the takeover of an enterprise, not by infusion of cash as in section 1962(a), but rather by some unlawful activity. The primary situation to which section 1962(b) would apply would be loan sharking. Here a business owner becomes indebted to the defendant, is unable to pay, and turns over a portion of his business to the defendant in payment of the debt. A second situation where section 1962(b) would apply is straight extortion. Again, an interest in the victim's business would be turned over to the defendant. As in the section 1962(a) cases, the enterprise will usually be a legitimate business. A pimp who fends off an attempt by a second pimp to take over part of his business by murdering that second pimp, however, probably could be prosecuted under section 1962(b). Naturally, the government would have to show the requisite "pattern of racketeering activity."

In order to successfully prosecute under section 1962(c) the government must show: (1) that the defendant was employed by or associated

<sup>83</sup> 18 U.S.C. § 1962 (1976).

<sup>84</sup> But see, Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1495-98 (1974).

<sup>85</sup> An alleged boss of a so-called "mafia" family is reputed to have "bought" his way into the family many years ago by laundering a large sum of "hot" currency. If so, this transaction is of the type that could arguably be prosecuted under § 1962(a).

with an enterprise; (2) that the enterprise was engaged in or the activities of the enterprise affected interstate commerce; (3) that the defendant conducted or participated in the affairs of the enterprise; and, (4) that the defendant participated in the enterprise through a pattern of racketeering activity or through the collection of an unlawful debt. Section 1962(c) is the section which is most likely to involve an unlawful enterprise. This is also the section which is most likely to generate prosecutions which were probably not contemplated by the legislature. Under this section a relatively uncomplicated undertaking by two persons not normally considered "organized crime figures" can run afoul of RICO.

A group of corporations can be an enterprise within the meaning of RICO.<sup>86</sup> However, they must not be merely unrelated businesses owned coincidentally by the defendant. They must all be involved in the underlying criminal acts, and they must be fairly characterized as a single business.<sup>87</sup> The statute requires that the activities of the enterprise, "not each predicate act of racketeering," have an effect upon interstate commerce.<sup>88</sup> The statute refers to "any activity engaged in, or the activities of which affect, interstate or foreign commerce."<sup>89</sup> The government must show a nexus between the enterprise and interstate or foreign commerce, albeit minimal, to satisfy the requirement.<sup>90</sup>

### CRIMINAL FORFEITURE

"Title IX's criminal forfeiture provision and its civil remedies—especially divestiture and dissolution—are directed towards reducing the power of those people in organized crime through restraint of their economic activity."<sup>91</sup> The forfeiture provision provides a means of separating the convicted racketeer from the enterprise. While the scope of the forfeiture is very broad, it is not limitless:

Congress' decision to reinstitute *in personam* forfeitures was a drastic step, and its power to do so was not free from doubt. RICO's proponents, including the Department of Justice, took pains to point out that the statute's provisions revived forfeiture of estate in a limited way. The convicted racketeer would not lose all of his property, and certainly not the right to own property. He would lose only his

<sup>86</sup> *United States v. Huber*, 603 F.2d 387.

<sup>87</sup> *Id.*

<sup>88</sup> *United States v. Rone*, 598 F.2d 564; *United States v. Nerone*, 563 F.2d 836, 852-54.

<sup>89</sup> 18 U.S.C. § 1962(c) (1976).

<sup>90</sup> *Perez v. United States*, 402 U.S. 146 (1971); *United States v. Rone*, 598 F.2d 564; *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir. 1978) (Hobbs Act violation), *cert. denied*, 439 U.S. 831 (1978); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), *rehearing denied*, 424 U.S. 950 (1976).

<sup>91</sup> *Comment, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for Criminal Activity*, 124 U. PA. L. REV. 192, 196 (1975).

interest in the business he corrupted in violation of RICO's substantive provisions. Although forfeiture was understood to be punitive, it did not portend massive losses so out of proportion to the criminal conduct that due process or eighth amendment guarantees would be compromised.<sup>92</sup> [footnotes omitted]

There is some doubt as to the scope of forfeiture authorized under section 1963(a). One commentator has reached the conclusion that the legislative history provides compelling evidence that Congress intended forfeiture of only a narrow category of interests, the proprietary or ownership rights of a defendant in a RICO enterprise.<sup>93</sup> He may be correct as to his conclusion, but the answer is not necessarily provided in the legislative history. The history is silent on that specific issue, and read in its entirety could lead to a conclusion which would indicate that all profits accrued by the racketeer through a pattern of racketeering should also be forfeited. Senator John L. McClellan (D. Ark.), Chairman of the Senate Judiciary Committee at the time the Act was passed, has written:

Title IX attacks the problem [of removing organized crime from our legitimate organizations] by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains. . . . Title IX, drawing on this early history, [of the common law of criminal forfeiture] would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity.<sup>94</sup>

Senator McClellan's words suggest that the language of section 1963(a) (1), "any interest he has acquired or maintained in violation of § 1962," includes more than only interests in an enterprise as provided in section 1963 (a)(2). Although the Senator stated that the purpose of his article was to "set the record straight concerning the implications of S.30,"<sup>95</sup> he did not help us out on this question. At best, the situation is well clouded in the legislative history.

Earlier this year the Ninth Circuit Court of Appeals took up this question in *United States v. Marubeni America Corporation*.<sup>96</sup> Marubeni America Corporation (Marubeni), an American Corporation and Hitachi Cable, Ltd. (Hitachi), a Japanese Corporation, were engaged in the production and sale of electrical cable. The government contended that Marubeni's local representative in Alaska had paid bribes to an official of Anchorage Tele-

<sup>92</sup> Taylor, *Forfeiture under 18 U.S.C. § 1963 — RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 380 (1980) (hereinafter cited as Taylor, *Forfeiture*).

<sup>93</sup> *Id.*

<sup>94</sup> McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 141 (1970).

<sup>95</sup> *Id.* at 55.

<sup>96</sup> 611 F.2d 763 (9th Cir. 1980), review vol 14/iss 1/4

phone Utility (ATU) for confidential bidding information on some supply contracts. Marubeni and Hitachi used the information to underbid their competitors. Based on their bids, Marubeni and Hitachi were awarded large parts of these supply contracts. The government sought forfeiture of the amounts paid or payable to Marubeni and Hitachi on the contracts. The government insisted that the term "interest" means any form of income or proceeds from a "pattern of racketeering activity."

The Ninth Circuit did not agree with the government's position. The court noted that when Congress meant "income" in the Act, it used that term. The implication was that the term "interest" as it was used in section 1963(a)(1)'s forfeiture provision meant something other than income derived from a pattern of racketeering activity.<sup>97</sup> The Ninth Circuit found the government's argument, that Congress must have sought to attack the potential for infiltration by depriving criminals of the ill-gotten gains they used to acquire interests in legitimate businesses, attractive, but could not reconcile this position with the language of the statute.

The court looked to the provisions of section 1962(a) which allow for the investment of "dirty money" into legitimate businesses by racketeers so long as they do so for investment, without intending to control the issues, and their total holdings do not exceed one percent of the outstanding securities of any one class. The court concluded that the government's position "defeat[ed] the 1 percent investment exception and made the rest of § 1962(a) surplusage because, under it, § 1962(c) would require forfeiture regardless of how racketeering income was invested."<sup>98</sup> The court was of the opinion that Congress plainly imposed criminal forfeiture to separate racketeers from the enterprises they owned, controlled or operated and not to attack racketeering broadsides:

We believe anyone who reads the legislative history must be struck by the singlemindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime. This purpose must be the linchpin of any construction of RICO. The government loses sight of this when it argues that a "loophole" would be created if racketeers were allowed to divest themselves of interests in an enterprise and thereby avoid forfeiture. Divestiture is not exploitation of a "loophole." It is the action that Congress intended to induce.<sup>99</sup>

The court's decision is questionable since it is based upon a false premise. As stated earlier, the scope of the forfeiture provision is not clearly established by the legislative history. The court, however, felt that the

---

<sup>97</sup> *Id.* at 766.

<sup>98</sup> *Id.* at 767.



legislative history was clear on this matter. This enabled the court to give undue weight to the argument that the government's position would render the one percent investment exception of 1962(a) mere surplusage in light of section 1962(c).

Section 1962(c) relates to the operation of an enterprise affecting interstate commerce through a pattern of racketeering activity. Section 1962(a) prohibits the investment of monies gained from a pattern of racketeering into an enterprise affecting interstate commerce. Under the total forfeiture theory, the one percent investment exception is rendered useless only if the pattern of racketeering activity which generated the investment *also* related to the conducting of, or the participation in the affairs of, an enterprise affecting interstate commerce. If the defendant raised money through a pattern of racketeering unrelated to any participation in an enterprise affecting interstate commerce, however, he would retain the benefit of the one percent exception. For example, if a defendant, acting completely alone, robs two state licensed banks on succeeding Mondays, never crosses a state line nor engages in any conspiracy with any other party, he has engaged in a pattern of racketeering activity as outlined in section 1961(5). However, he has not yet violated any provision of section 1962. Section 1962(c) requires the operation of an enterprise. There clearly was no enterprise. Section 1962(b) requires the acquisition or maintenance of an interest in an enterprise. Again, there is no enterprise over which he has gained or maintained any interest or influence. Section 1962(a) requires the investment of funds. The defendant has not yet invested any of the proceeds from the bank robbery. Clearly, he did not gain any interest in the banks because of the robberies. Accordingly, he has not violated RICO.

The defendant then takes the proceeds of the bank robberies and makes two investments. With a portion of the funds he buys, on the open market, IBM stock, in an amount less than one percent of any outstanding class. Obviously, he could have no reasonable expectation of controlling IBM or electing a director. With the remaining money he invests in a gambling casino on the California-Nevada border. The lodge is an enterprise engaged in or affecting interstate commerce. By virtue of his investment in the casino, the defendant has violated section 1962(a). He still has not violated section 1962(c). Upon prosecution, he could be ordered to forfeit his interest in the casino but not his stock in IBM. He is still entitled to the one percent investment exception of section 1962(a). Accordingly, section 1962(c) does not render that exception mere surplusage. There are instances, however, where that exception will not be available to the racketeer under the general forfeiture theory. If an individual operates an interstate enterprise through a pattern of racketeering and then invests the proceeds of that activity in stock of a third enterprise, he will not be allowed to rely upon the exception. In that case the money is forfeited

under section 1962(c). Accordingly, the court's central premise in *Marubeni* is incorrect.

Further, the court's interpretation renders section 1963(a)(1) mere surplusage. Section 1963(a)(1) requires a forfeiture of any interest acquired or maintained in violation of section 1962. Section 1963(a)(2) requires the forfeiture of "any interest in . . . any enterprise which he [the defendant] has established, operated, controlled, conducted or participated in the conduct of, in violation of § 1962." If this requirement is added to section 1963(a)(1) by implication, as suggested by the Ninth Circuit, it renders section 1963(a)(1) meaningless. Anything forfeitable under section 1963(a)(1) would also be forfeitable under section 1963(a)(2). Such a result is untenable.

Additionally, there is no ambiguity in the language of section 1963(a). The language involving control or influence over an enterprise is found only in clause (2) of section 1963(a). It does not appear anywhere in section 1963(a)(1). The two clauses are grammatically distinct. Clause (1) is completely contained in that section prior to the comma and subclause identifier [(2)]. In no way could it be reasonably argued that some of the language subsequent to the clause (2) designation modifies the preceding clause. If Congress wanted to include the language involving control of an enterprise as part of clause (1) it would have done so. The failure to include that language must be interpreted as a clear statement that it is not applicable. Resorting to the legislative history is inappropriate in this instance. A review of the legislative history is appropriate to resolve an ambiguity on the face of the statute. There is no ambiguity on the face of this statute. Its language is clear; the legislative history cannot be relied upon to reach a result opposite from the plain meaning of the words.

In *United States v. Thevis*<sup>100</sup> the district court, relying upon *Marubeni*,<sup>101</sup> also concluded that the interest forfeitable under section 1963(a) is limited to an interest in an enterprise and does not extend to fruits and profits generated from the enterprise. For the reasons stated above, *Thevis* was also decided incorrectly. Under the theory developed in *Marubeni* and *Thevis*, if an organized crime organization, through a pattern of racketeering, secured a loan from a union pension plan, the proceeds of that loan would not be forfeitable unless they were invested in an enterprise affecting interstate commerce in order to influence that enterprise. Congress could not possibly have intended such a result.

Forfeitable rights apparently include elected offices in labor unions. In two cases, courts have ordered defendants to forfeit their presidential

<sup>100</sup> 474 F. Supp. 134 (N.D.Ga. 1979).

Published by Idea Exchange@Hakron-1981

<sup>101</sup> *United States v. Marubeni America Corp.*, No. 78-1060 (D.Cal. March 30, 1979).

offices in labor unions where the defendants were found to have conducted the union through a pattern of racketeering activity.<sup>102</sup> In neither case did the court order perpetual forfeiture of the defendant's right to be re-elected to the office. The statute's limited reach permits forfeiture only of currently held rights.<sup>103</sup> In *United States v. Rubin*<sup>104</sup> the Fifth Circuit found that the appellant, who had been found guilty of embezzlement of union and employee welfare benefit plan funds, racketeering, false statements on income tax returns and failure to keep labor union records, could be ordered to forfeit his union office. The court further stated:

The forfeiture sanction, however, can have no proper effect upon appellant's right in the future to seek union office, including the offices he must now give up. That right to run for and hold office is not something appellant as an individual has acquired or maintained with respect to the various union entities; it is the same right possessed by all members of all unions. In no sense a contractual or property right held by the individual against a union, the right to seek union office is rather guaranteed by federal statute. See 29 U.S.C. 481(e). The language of the new penal statute does not extend to such a right.<sup>105</sup>

There are a number of cases now pending which will hopefully add some light to this question. In Massachusetts, there is an extended investigation being conducted by the Special Commission Concerning State and County Buildings into a pattern of bribery of state officials by an architectural firm for the purpose of securing state contracts. The United States Attorney has indicated an interest in prosecuting under RICO.

In the Northern District of California, a number of members of the "Hell's Angels" motorcycle gang were convicted on RICO charges. The government contended that the "Hell's Angels" were subject to prosecution under RICO because club bylaws required members to sell drugs and protect the traffic by committing murders and assault and by bribing law enforcement officials.<sup>106</sup>

In New York, the president of the Newspaper Deliverers Union is charged with racketeering and extortion, partly in connection with a 1978 newspaper strike in New York. The 136 count indictment accuses the defendant of receiving unlawful payoffs from seven wholesale newspaper delivery companies from 1976 to 1979.<sup>107</sup> In Philadelphia, a Teamster Union

<sup>102</sup> *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *cert. denied*, 100 S. Ct. 133 (1979); *United States v. Barone*, No. 78-185 (S.D. Fla. Oct. 17, 1979); Taylor, *Forfeiture*, *supra* note 92.

<sup>103</sup> *Id.*

<sup>104</sup> 559 F.2d 975.

<sup>105</sup> *Id.* at 992-93.

<sup>106</sup> *Washington Post*, Aug. 19, 1980, § A, at 12, col. 4.

<sup>107</sup> *Washington Post*, Feb. 21, 1980, § A, at 12, col. 4.

leader was recently acquitted of racketeering charges which alleged murder, arson and embezzlement.<sup>108</sup>

Also in Philadelphia, racketeering charges may soon arise out of the gangland style murder of a reputed organized crime leader who was allegedly murdered over a dispute concerning control of a gambling business in Atlantic City, New Jersey.<sup>109</sup>

The Fifth Circuit Court of Appeals has recently declared that the word "shall" in the forfeiture statute is used in the mandatory sense. Accordingly, a district court has no discretion to refuse to order forfeiture of a convicted defendant's tainted property interest. The language of the statute itself was meant to be mandatory.<sup>110</sup>

#### FORFEITURES RELATED TO LABOR UNIONS

There are primarily two ways in which all of the foregoing relate to labor unions. First, and most likely, a defendant might acquire or maintain an interest in or control of a labor union through a pattern of racketeering activity. Secondly, a labor union itself might conduct its affairs through a pattern of racketeering activity. The question arises as to whether assets of the labor union may be forfeited as a result of these violations of section 1962.

It seems well settled that if a defendant acquires or maintains control over a labor union through a pattern of racketeering activity, the only thing subject to forfeiture is the defendant's position in the labor union.<sup>111</sup> It would be most unlikely for an individual to invest racketeering funds into a labor union in violation of section 1962(a). Usually the vice complained of is the defendant's looting of the union treasury, not his building it up. An interesting question arises if an employee of a labor union should engage in the conduct of that labor union through a pattern of racketeering activity, *not chargeable to the union itself*, and as a result thereof acquires an interest in something. Under the *Marubeni/Thevis* theory, unless that interest was in an enterprise, no forfeiture would be allowed. Accordingly, if a union official engages in the extortion of a trucking company, the money extorted would not be forfeitable. This is contrary to the congressional intent. Under a general forfeiture theory, the proceeds of the extortion would be forfeitable. Under either theory, if the defendant then took funds and bought stock in a Las Vegas casino, that stock would be forfeited. However, the underlying violation would be of section 1962(a),

<sup>108</sup> Washington Post, Feb. 23, 1980, § A, at 12, col. 4.

<sup>109</sup> Washington Post, March 29, 1980, § A, at 10, col. 6.

<sup>110</sup> United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980).

<sup>111</sup> See United States v. Rubin, 559 F.2d 975; United States v. Barone, No. 78-185 (S.D. Fla. Oct. 17, 1979).

not section 1962(c). As a practical matter then, the union cannot be "shut down" under RICO because of racketeering activity of third parties which allow those parties to gain control of a union local.

What about the situation where the union itself engages in a pattern of racketeering activity? As an inanimate object, created by statute, the labor union can operate only through third party officers, agents and employees. Not all actions of a labor union officer or agent are chargeable to the union itself. Thus, if the president of a union local, acting for his own personal profit, extorts money from a trucking firm, the labor union should share no civil or criminal responsibility for his acts. Only those actions taken by an authorized agent, acting pursuant to apparent union authorization and in the furtherance of union affairs, are deemed to be actions of the union itself. Naturally, a union can ratify actions taken by one who does not meet the above criteria at the time of the action.

If a union local determines, through deliberations of its management, to engage in a pattern of racketeering activity which allows it to gain control of an enterprise affecting interstate commerce, and does so for the benefit of the union and its membership, then that union has violated section 1962 and is liable under section 1963(a). For instance, assume the existence of a union local in New York which is governed by a president, vice president, secretary-treasurer and a seven-member executive board. At a meeting of the executive board, all ten persons vote to gain control of a trucking company in Philadelphia. The trucking company in Philadelphia employs people who live in Pennsylvania, Delaware and New Jersey. The company serves businesses located in those same three states. The union intends, through use of murder, bribery, extortion and theft from interstate shipments, to gain a majority of the company's director positions for union stooges for the express purpose of negotiating a contract calling for payments to the union pension plan to the credit of employees who do not exist. The union specifically intends to loot the company bank accounts and then declare bankruptcy. The pension fund then takes the money contributed under the new bargaining agreement and builds a gambling casino on the California-Nevada border. The trustees of the pension plan are the officers and members of the executive board of the union.

The union itself through its authorized agents, has violated sections 1962(c) and 1962(b) and by investing in the gambling casino, section 1962(a). However, all of the benefit of the activity runs to the general membership of the union, none of whom had anything to do with the racketeering activity. To forfeit the union's interest in the gambling casino would work to the distinct financial disadvantage of the union membership.

Under the *Marubeni/Thevis* theory, only the union's interest in the gambling casino would be forfeited. Although the pension plan is an enter-

prise affecting interstate commerce, the pattern of racketeering did not allow anyone to gain or maintain an interest in the pension plan. Accordingly, those funds not resulting in the acquisition of an interest in some enterprise are not forfeited. Money deposited in commercial banks would remain there. Funds in mutual banks and credit unions may be subject to forfeiture, since the amount of deposits represent management shares in the institution.

Under a general forfeiture theory, all of the payments by the company to the union which result from the racketeering activity could be forfeited. There is the obvious public policy question, however, of whether any of the funds should be forfeited. The officers and agents of the union hold a fiduciary duty towards the members.<sup>112</sup> The beneficial owners of the money which was extorted are the members of the union at large. None of the beneficial owners engaged in a pattern of racketeering activity. To forfeit the interest in the Las Vegas casino may well bankrupt the pension plan and cause financial hardship to innocent union members. As a matter of public policy, should such a result be allowed?

Naturally, there is not yet any answer to this question. Under the existing law, as represented by *Marubeni* and *Thevis*, the union's holdings in the casino could be forfeited under RICO. To hold otherwise would encourage union officers to engage in illegal acts to further union interests and allow union members to close their eyes to the officers' tactics so as to avoid an implied ratification by non-action. Under a corporate responsibility theory, the business organization, here a labor union, would be responsible for the acts of its agents done with apparent authority and in furtherance of corporate interests. As a result of that activity and the resulting sanctions, the innocent partners, the stockholders, would suffer a loss in market value of their investment regardless of the fact that they did not engage in any wrongdoing. Arguably, the same result should be reached here.<sup>113</sup>

The interests of the union members, however, may be more intense than that of stockholders. The individual union member may be in a position where his pension, for which he has worked and contributed for decades, is wiped out by an action of the United States Government. Either alternative is unacceptable. Congress should act to fill the gap and ensure that racketeering activity by union officers and agents is economically disadvantageous. It must also act to insure that the individual members' interests are adequately protected.

---

<sup>112</sup> 29 U.S.C. § 501 (1976).

<sup>113</sup> *But see United Brotherhood of Carpenters v. United States*, 19 L.R.R.M. 2406, 2410 (1947).

